IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1640

F. D. RICH COMPANY, INCORPORATED, a corporation doing business in the state of Washington and AMERICAN SURETY COMPANY, *Petitioners,*

v.

ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation; B & G CONSTRUCTORS, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANY; and UNITED STATES FIDELITY & GUARANTY COMPANY.

REPLY BRIEF OF PETITIONERS F. D. RICH COMPANY, INCORPORATED AND AMERICAN SURETY COMPANY

Fireman's Fund Concedes That State Law Governs the Effect of Corporate Dissolution on Pending Actions

Fireman's Fund takes a position opposing petitioners' petition for a writ of certiorari which is in direct conflict with the opinions in this case of the Court of Appeals for the Ninth Circuit. Fireman's Fund's principal contention is that the:

> Decision Below [Directing the Substitution of Shareholders for the Dissolved Corporate Party] Was Not Contrary to Washington Law

Fireman's Fund's argument in support of that contention, rather than being persuasive as to why a writ of certiorari should not issue, illustrates the error committed by the Court of Appeals in failing to apply governing state law.

Fireman's Fund claims that the decision of the Court of Appeals did not conflict with Washington law because under Washington law substitution could be made to an action which abated upon dissolution of a corporate party. Petitioners strongly disagree with Fireman's Fund interpretation of Washington law but agree that Washington law must be applied.

The Court of Appeals correctly held, in both its original opinion and its per curiam opinion on rehearing, that the law of Washington in existence at the time of dissolution of Piper & Greenhalgh, Incorporated was the common-law rule that such dissolution abated any action in which the dissolved corporation was appearing as plaintiff or defendant (Appendix of Petitioners, pages 4 a, 10 a). The Court of Appeals, however, refused to apply Washington law. It held that the Washington rule was a procedural rule not binding upon the District Court. It is submitted that this disregard of the controlling substantive state law is contrary to the opinions of this Court and the other circuits as is discussed in the petition for writ of certiorari.

Fireman's Fund's brief effectively concedes that state law must be applied to determine the effect of dissolution upon a pending action. It does not attempt to distinguish the decisions of this Court in *National Bank* v. *Colby,* 88 U.S. (21 Wall.) 609 (1875); *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257 (1927); *Chicago Title & Trust Co.* v. *Forty-One Thirty-*

Six Wilcox Bldg., Corp., 302 U.S. 120 (1937); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631 (1949); and *Melrose Distillers* v. *United States*, 359 U.S. 271 (1959). It claims the Court of Appeals' decision does not conflict with the decisions of the Tenth Circuit in *United States* v. *United States Vanadium Corp.*, 230 F. 2d 646, cert. den., 351 U.S. 939 (1956) and *R. V. McGinnis Theatres & Pay T. V., Inc.* v. *Video Independent Theatres, Inc.*, 386 F. 2d 592 (1967), cert. den., 390 U.S. 1014 (1968):

> . . . which merely held that the law of the State governed the incidents of the corporation. (Brief, Fireman's Fund, p. 14)

It does not even argue whether procedural law or state substantive law governs the substitution of parties to an abated action. Rather, it cites numerous Washington cases in an attempt to show that *under Washington substantive law* a court has power to substitute shareholders to an action which abated upon dissolution of a corporate party. As was pointed out in the petition (pages 8-9) Washington law is to the contrary and the Court of Appeals so held. The error committed by the Court of Appeals is that it refused to apply Washington law.

An Abated Action Has No Further Existence for Any Purpose

Fireman's Fund misinterprets the meaning of "abatement" in suggesting that shareholders of a dissolved corporation are entitled to be substituted, either on their own behalf or as "trustees for creditors", to an abated action. Abatement of an action by reason of the dissolution of a corporate party effectively puts an end to the suit and arrests all procedure therein. 16A Fletecher Cyclopedia, Corporations (1962, Rev. Vol.) 348, § 8150.

The Washington court adopted the common-law rule as to the effect of an abatement in *Gordon* v. *Hillman,* 109 Wash. 223, 232-233, 186 Pac. 651 (1919):

> . . . At common law all actions pending abated upon the death of a necessary party. If the cause of action was one that did not survive, death finally ended the action; but if the cause of action was one that did survive, a new action by or against the personal representative of the deceased party was necessary to prosecute the remedy.

Other jurisdictions have defined "to abate" in various fact contexts as "the action is utterly dead and cannot be revived except by commencing anew" [*Smith* v. *Phlegar,* 73 Ariz. 11,236 P.2d 749 (1951)], "to abate a suit is to put an end to its existence" [*Simmons* v. *Superior Court,* 96 Cal. 2d 119, 214 P. 2d 844 (1950)], "abatement at law is the overthrow or destruction of a pending action apart from the cause of action" [*Bowles* v. *Wilke,* 175 F. 2d 35 (7th Cir. 1949)], and "As the death of the natural person abates all pending litigation to which such a person is a party, by like token, the dissolution of a corporation at common law abates all litigation in which the corporation appears either as plaintiff or defendant" [*Leiserson & Adler, Inc.* v. *Keam,* 266 S.W. 2d. 352 (Ky. 1954)].

In this case, Piper & Greenhalgh, Incorporated was finally dissolved on February 18, 1966, and the pending actions by and against Piper & Greenhalgh, Incorporated by operation of Washington law *at that time.* The legal proceedings by and against the corporation came to an end. There was no longer any action involving Piper & Greenhalgh, Incorporated as a party for which the shareholders could be substituted.

The District Court Has No Equity Power To Substitute Parties

The Court of Appeals and Fireman's Fund cite *Bacon* v. *Robertson,* 59 U.S. 480 (1855), for the proposition that a federal court has the equity power to protect those interested in foundering corporations. First, the proposition is based upon the incorrect statement by Judge Goodwin in the Court of Appeals opinion (Appendix of Petitioners, p. 3a) that Piper & Greenhalgh, Incorporated was "forced into bankruptcy and liquidation". Val Greenhalgh and George Piper filed a *voluntary* petition for dissolution of the corporation (see Stipulation, Appendix of Petitioners, p. 11a). There was no bankruptcy or involuntary proceeding. On December 31, 1965, Piper, as liquidating trustee for the dissolved corporation, certified:

> . . . all obligations of the corporation have been paid and all assets of the corporation distributed to stockholders and for all purposes the corporation has been fully liquidated.
>
> (Stipulation, Appendix of Petitioners, p. 12a)

Second, whether the court has such power *in an appropriate proceeding* (*Bacon* involved an action by shareholders of a corporation against a trustee in dissolution of that corporation—there was no abatement of an action and no substitution of parties for a dissolved corporate litigant) is not an issue before this Court. As has been discussed, in the petition and in this reply, it is clearly *not* within the equity powers of a federal court to reject the effect of an abatement under applicable Washington law and continue in existence an action which, under Washington law, has ended.

CONCLUSION

The Court of Appeals chose to apply federal procedural law and to disregard state substantive law in determining the effect of dissolution of Piper & Greenhalgh, Incorporated on actions pending by and against the corporation. The result of that decision is to engraft a federal corporation law (a federal corporation law that is contrary to that applied even to federally created corporations. *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631 (1949)) onto the state law of corporations. If this can be done in the area of corporate law which has heretofore been considered exclusively a matter of state power, it can be done with any other area of state law. The ultimate effect could be the end of our dual system of federal and state law.

The Writ of Certiorari should issue.

Respectfully submitted,

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